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AUG 29 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

In the Matter of Implementation of
Safeguards of Sections 271 and 272 of the
Communications Act of 1934, as amended;

and

Regulatory Treatment of LEC Provision of
Interexchange Services Originating in the
LEC's Local Exchange Area

)
) CC Docket No. 96-149
)

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COMMENTS
of the
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

The National Telephone Association ("NTCA") submits these comments to issues related to the regulation of independent local exchange carriers contained in the Notice of Proposed Rulemaking ("NPRM") released on July 18, 1996. The two issues for which the Commission has extended the time for filing comments are (1) whether the regulatory regime for independent LECs should be altered in order for these companies to qualify for non-dominant treatment, and (2) whether the Commission should change the market definition it has previously used for assessing the presence or absence of market power of the independent LECs in providing "in-region," interstate, interexchange services.

NTCA is a national association of approximately 500 local exchange carriers ("LECs") that provide service primarily in rural areas. All NTCA members are small carriers that are "rural telephone companies" as defined in the Telecommunications Act of 1996 ("Act").¹ The

¹ Telecommunications Act of 1996, Pub. L. No. 104-1-4, 110 Stat. 56 to be codified at 47 U.S.C. §§ 151 *et. seq.*

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average total number of subscribers for the companies is very small, 5, 438 for the companies organized as cooperatives and 3,446 for the commercial companies. Approximately half of NTCA's members are organized as cooperatives. A number of NTCA members provide in-region interstate, domestic, interLATA or in-region international services as defined by the Commission. Others are interested in providing the services. These LECs operate under current rules that require them to comply with separation requirements in order to qualify for non-dominant regulatory treatment in the provision of these services.

DISCUSSION

I. THERE IS NO BASIS FOR CONCLUDING THAT ALL INDEPENDENT LECs SHOULD BE CLASSIFIED AS DOMINANT OR SUBJECT TO STRUCTURAL SEPARATIONS REQUIREMENTS IN THEIR PROVISION OF IN-REGION INTERSTATE INTEREXCHANGE SERVICES.

The Commission has no basis upon which to conclude that all incumbent LECs should be classified as dominant. This misclassification forces small incumbent LECs that provide in-region interexchange service to choose between two alternatives that each impose costly burdens on their operations. The companies must either form separate subsidiaries or choose to have their interexchange services subjected to the onerous requirements associated with dominant status while AT&T and other large carriers enjoy nondominant treatment for their provision of these services.

The Commission admits that it previously focused on market share, supply and demand substitutability, the cost structure, size, or resources of the firm, and [lastly] control of bottleneck facilities in determining whether a firm possesses market power.² However, in its tentative

² NPRM, ¶ 133.

conclusion, the Commission appears to abandon most of these factors and to focus solely on its conclusion that control of bottleneck facilities makes it necessary to require structural separations even if it does not classify an independent LEC as dominant.³

The Commission justifies the separations requirement on its belief that all independent LECs could use their control of exchange access facilities to improperly shift costs to monopoly services or discriminate against rival IXCs.⁴ It has not, for example, considered the size and resources of small incumbent LECs. The average size of NTCA members and of REA borrowers in general is indicative of the fact that the companies do not have the ability to leverage size or massive resources to the detriment of rival interexchange carriers. The most recent RUS data shows that the average number of subscribers for the 199 RUS borrower cooperatives is a mere 5,777 while the overall average which includes commercial borrowers is only 6,260.⁵ It is pure speculation to assert that all incumbent LECs or their affiliates, regardless of their size, have the ability to exercise market power so as to disadvantage their interexchange competitors. There is also no basis to conclude that new entrants in local exchange markets should be treated differently from these small LECs because they will not have control of local exchange access facilities.⁶ New LEC entrants who provide in-region interexchange services are free to and have built or acquired control of local exchange access facilities. Moreover, under the

³ NPRM, ¶ 158.

⁴ *Id.*

⁵ USDA, RUS 1994 STATISTICAL REPORT OF RURAL TELECOMMUNICATIONS BORROWERS, INFORMATIONAL PUBLICATION 300-4, Table 9.

⁶ NPRM, ¶ 153.

interconnection provisions of Section 251 of the Act and the Commission's interconnection rules, these new LEC entrants will have substantial advantages in obtaining access to incumbent LEC facilities.

There is also no basis to conclude that small incumbent LECs will cross subsidize their in-region interexchange services to the detriment of regulated or monopoly services. Sufficient safeguards are already in place to avert cross-subsidization. The interstate access charges of incumbent LECs are filed with the Commission and subject to Title II review as well as complaint procedures. Independents that participate in the NECA pools as well as those that file their own tariffs are highly unlikely to have the leveraging ability to manipulate their exchange access charges to disadvantage rival interexchange carriers. Further, there is no record or indication that incumbent LECs are subsidizing the in-region interexchange services they now provide.

The Commission seeks comment on whether there is some minimum independent LEC size below which the separations requirements should not apply. NTCA recommends that the separations requirements be abandoned completely. However, if the Commission decides to retain the requirement, NTCA recommends that the requirement not apply to "rural telephone companies" as defined in the Act. While these companies may want to create separate subsidiaries to provide in-region interexchange services, they should not be required to do so. The costs associated with separations requirements may outweigh the benefits for many small companies. The decision as to whether to incur these costs is a business decision which should be left to the business judgment of the companies. Small companies and their subscribers, particularly the cooperatives, actually lose benefits in the form of name recognition and goodwill

by operating their in-region interexchange business through a separate subsidiary . In the absence of any appreciable benefits to the public, these member/subscriber owned companies should not be required to form subsidiaries to provide interexchange services to themselves.

II. THE COMMISSION SHOULD CONSIDER FLEXIBLE REGULATORY PROPOSALS THAT FIT REQUIREMENTS TO THE SCALE OF THE BUSINESS AND MINIMIZE THE ADVERSE ECONOMIC IMPACT ITS RULE WILL HAVE ON RURAL TELEPHONE COMPANIES THAT ARE SMALL ENTITIES OR SMALL BUSINESSES.

The Commission's Initial Regulatory Flexibility Analysis ("IRFA") is defective because it incorrectly certifies that the rules will not have a significant economic impact on a substantial number of small entities. The small companies that make up NTCA's membership are "small business concerns" under the Regulatory Flexibility Act ("RFA"). The Commission should therefore consider flexible regulatory proposals and analyze any significant alternatives that would minimize significant economic impacts the proposed rules will impose on the companies.

The Commission's certification is based on its incorrect interpretation of 5 U.S.C. § 601(6) which the Commission, [indicating that this section adopts 15 U.S.C. § 632(a)(1)] relies on for its conclusion that the BOCs and other incumbent LECs are dominant in their field of operation. The Commission has misinterpreted 5 U.S.C. § 601(6) and 15 U.S.C. § 632(a)(1). The RFA definition relied on, 5 U.S.C. § 601(6), refers back to 5 U.S.C. § 601(3) for the definition of a "small business concern." 5 U.S.C. § 601 (3) requires that the Commission consult with or use SBA definitions to determine what "small businesses" or "small business concerns" will be impacted by a proposed rule.

5 U.S.C. § 601(3) provides: "the term 'small business' has the same meaning as the term 'small business concern' under section 3 of the Small Business Act, unless an agency, after

consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

The SBA has published its section 3 definitions in 13 C.F.R., section 121. These definitions establish standards for determining what size company in a particular industry is a “small business concern.” The SBA regulations clearly state that the definitions it has established “seek to ensure that a concern that meets a specific size standard is not dominant in its field of operation.”⁷ The Commission cannot ignore SBA definitions and conclude that all incumbent LECs are dominant for purposes of the RFA. For purposes of the RFA, SBA definitions and rules apply and the SBA has already considered criteria related to dominance in promulgating its definitions.

NTCA strongly recommends that the Commission consider its recommended alternative for the treatment of small incumbent LECs in its final Regulatory Flexibility Analysis.

CONCLUSION

For the above stated reasons, NTCA recommends that the Commission abandon its prior determination that all incumbent LECs are dominant. If it does not or if it determines that separations are nevertheless required for these companies’ provision of in-region interexchange services, NTCA recommends that the Commission create an exception excusing rural telephone companies from structural separations requirements. NTCA also recommends that the Commission abandon its determination that all incumbent LECs are dominant for purposes of the

⁷ 12 C.F.R. § 121.102 (b).

RFA and consider alternatives to reduce adverse impacts its rules may impose on the small companies that are NTCA's members.

Respectfully submitted,

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August 29, 1996

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Reply Comments of the National Telephone Cooperative Association in CC Docket No. 96-149 was served on this 29th day of August 1996, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list.


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